

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOHNNIE LEE WALTERS,

Petitioner,

v.

PATRICK GLEBE,

Respondent.

Case No. C14-903 RSL-BAT

**REPORT AND  
RECOMMENDATON**

Petitioner Johnnie Lee Walters seeks 28 U.S.C. § 2254 habeas relief from his conviction by jury verdict of one count of assault in the first degree (while armed with a firearm) and one count of unlawful possession of a firearm in the second degree. Dkt. 3. The Court later granted Mr. Walters leave to amend his petition to include an additional ground for relief. Dkt. 23. The parties provided additional briefing on the fourth ground. Dkts. 24 and 25. Thus, Mr. Walters' petition as amended presents this Court with four grounds for relief: (1) insufficient evidence of first-degree assault; (2) violation of right to present a necessity defense; (3) denial of right to counsel of his choice; and (4) ineffective assistance of counsel. Dkt. 3, at 5-8 (Grounds 1-3); Dkt. 20, attached page (Ground 4).

The Court recommends DENYING the claims as Mr. Walters has failed to demonstrate that the state-court adjudication of his claims was contrary to, or an unreasonable application of,

1 established federal law, or was an unreasonable determination of the facts in light of the evidence  
2 presented. See 28 U.S.C. § 2254(d)(1)–(2). The Court also recommends DENYING the  
3 issuance of a certificate of appealability.

## 4 **BACKGROUND**

### 5 **A. Statement of Facts**

6 The Washington Court of Appeals summarized the facts underlying Mr. Walters’  
7 convictions as follows:

8 The State charged Johnnie Lee Walters, Jr., with one count of first degree  
9 assault while armed with a firearm and one count of second degree unlawful  
10 possession of a firearm following a shooting at a South Seattle gas station.  
11 Surveillance cameras at the station captured much of the incident, and the video  
12 recordings were played several times for the jury and witnesses during the course  
13 of the trial.

14 Detra Harris testified that she spent most of June 23, 2007, with her  
15 friends Treniqua Crowder and Deche Washington. Late in the evening,  
16 Washington became “stressed,” and Harris drove him and Crowder to a nearby  
17 Union 76 gas station. Appellant Walters and Charles Chappelle were already at  
18 the gas station when Harris arrived.

19 Harris parked her car near the air and water machines, and all three  
20 occupants got out. Harris saw Chappelle approach Washington “cussing and  
21 yelling obscenities.” Harris understood Chappelle to be urging Washington to  
22 fight, and the two men then raised their fists and moved around as though they  
23 were going to punch one another.

When Walters walked up next to her, Harris asked him why the two men  
were fighting. Walters said that he did not know because Washington and  
Chappelle were supposed to be friends. Walters did not reply when Harris asked  
him to intervene, but Harris saw Walters place his hand near a shiny gun in his  
pocket or waistband.

A short time later, Washington walked away from Chappelle and removed  
a shotgun from Harris’s car. Washington then approached Chappelle and fired a  
“warning shot” into the air. One of the video recordings showed Washington  
walking toward Chappelle with the shotgun and Chappelle running away.

Shortly after Washington fired the shotgun, Walters pulled out a  
semiautomatic handgun and began firing toward Washington. The video shows

1 Washington, who was standing near a gas pump, turn suddenly and then stumble  
2 or fall to the ground, dropping his shotgun. Harris testified that Washington lay  
3 on the ground moving from “side to side” and trying to cover his head while  
4 Walters continued firing “by his head.”

5 Washington got up and ran in a “zigzag” pattern around the gas pumps  
6 and then across Rainier Avenue as Walters chased after him and continued  
7 shooting. Harris immediately returned to her car, drove out of the gas station, and  
8 picked up Washington from a vacant lot across the street. When Harris  
9 discovered that Washington was bleeding and appeared to be severely injured, she  
10 drove quickly to Harborview Hospital. Harris noticed that Walters’ car followed  
11 her for about a half-block before turning off. At the hospital, surgeons repaired  
12 serious injuries to Washington’s femoral artery and vein resulting from a gunshot  
13 wound to the left groin area.

14 At the gas station, police officers recovered one spent shotgun shell casing  
15 and a total of fifteen .40 caliber cartridge casings from a handgun.

16 After viewing the surveillance video, Walters gave a statement to police  
17 that was admitted at trial. Walters said that he and Chappelle were at the gas  
18 station getting gas when Chappelle and Washington got into an argument.  
19 Walters asserted that he acted in self-defense and began shooting at Washington  
20 after Washington fired the shotgun at Chappelle.

21 The trial court instructed the jury on self-defense, but refused to give  
22 Walters’ proposed instruction on a necessity defense for the unlawful possession  
23 charge. During closing argument, the deputy prosecutor conceded that Walters  
could have begun shooting in self-defense or in defense of Chappelle, but asserted  
that he committed the charged assault when he continued shooting after  
Washington dropped the shotgun and attempted to run away.

The jury found Walters guilty as charged, and the court imposed  
concurrent standard range terms for a total sentence of 198 months.

Dkt. 12, Exhibit 15, at 1-4.

## **B. State Procedural History**

### **1. Direct Appeal**

Mr. Walters appealed his conviction to the Washington Court of Appeals. Dkt. 12,  
Exhibit 10. Mr. Walters also filed motions to be released on bond during the pendency of his  
appeal, first on a pro se basis and later a motion submitted by appellate counsel. *Id.*, Exhibits 12-

1 14. On April 18, 2011, the Court of Appeals rejected Mr. Walters' appellate claims and affirmed  
2 his conviction in an unpublished opinion. *Id.*, Exhibit 15. Shortly thereafter, the Commissioner  
3 of the Court of Appeals denied his motion to set appeal bond and the three-judge panel denied  
4 his motion to modify the Commissioner's ruling. *Id.*, Exhibits 16 and 18.

5 Mr. Walters sought discretionary review by the Washington Supreme Court. *Id.*, Exhibit  
6 19. Mr. Walters also filed a motion for discretionary review of the Court of Appeals' denial of  
7 his motion for an appeal bond. *Id.*, Exhibit 20. On September 7, 2011, the Supreme Court in  
8 separate orders denied the petition for review and the motion for discretionary review without  
9 comment. *Id.*, Exhibits 21 and 22. The Court of Appeals issued its mandate on October 5, 2011.  
10 *Id.*, Exhibit 23.

## 11 **2. Motion for Bail and New Trial / Personal Restraint Petition**

12 On October 8, 2010, while the direct appeal was pending, counsel for Mr. Walters filed a  
13 motion for bail and for a new trial with the superior court, arguing that he was denied his right to  
14 counsel of his own choosing and that his defense counsel provided ineffective assistance at trial  
15 by failing to call Charles Chappelle as a defense witness. *Id.*, Exhibit 24. On October 12, 2010,  
16 the superior court denied the motion for bail pending appeal and transferred the motion for a new  
17 trial to the Washington Court of Appeals to be considered as a personal restraint petition. *Id.*,  
18 Exhibit 25.

19 After further briefing by the parties, the Chief Judge of the Court of Appeals dismissed  
20 the petition on May 3, 2013. *Id.*, Exhibit 30. Mr. Walters filed a pro se motion for discretionary  
21 review with the Washington Supreme Court raising the same denial of counsel and ineffective  
22 assistance arguments he presented to the lower courts. *Id.*, Exhibit 31. On February 26, 2014, the  
23 Commissioner of the Washington Supreme Court denied Mr. Walters' motion. *Id.*, Exhibit 32.

1 The Court of Appeals issued a certificate of finality on April 30, 2014. *Id.*, Exhibit 33.

## 2 EVIDENTIARY HEARING

3 The decision to hold a hearing is committed to the Court's discretion. *Schriro v.*  
 4 *Landrigan*, 550 U.S. 465, 473 (2007). "[A] federal court must consider whether such a hearing  
 5 could enable an applicant to prove the petition's factual allegations, which, if true, would entitle  
 6 the applicant to federal habeas relief." *Landrigan*, 550 U.S. at 474. In determining whether  
 7 relief is available under 28 U.S.C. § 2254(d)(1), the Court's review is limited to the record before  
 8 the state court. *Cullen v. Pinholster*, ---U.S.---, 131 S.Ct. 1388 (2011). A hearing is not required  
 9 if the allegations would not entitle petitioner to relief under 28 U.S.C. § 2254(d). *Landrigan*,  
 10 550 U.S. at 474. "It follows that if the record refutes the applicant's factual allegations or  
 11 otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."  
 12 *Id.*; see also *Cullen*, 131 S. Ct. 1388 (2011). The Court finds it unnecessary to hold an  
 13 evidentiary hearing because Mr. Walters' claims may be resolved on the existing state court  
 14 record.

## 15 DISCUSSION

### 16 A. Claim 1 - Insufficient Evidence (First-Degree Assault Charge)

17 In his first ground for relief Mr. Walters claims the evidence presented at trial was  
 18 constitutionally insufficient to support the jury's guilty finding for first-degree assault.

19 The Constitution forbids the criminal conviction of any person except upon proof of guilt  
 20 beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). When evaluating a claim of  
 21 insufficiency of the evidence to support a conviction, the reviewing court must decide "whether,  
 22 after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact  
 23 could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v.*

1 *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). “*Jackson* leaves juries broad  
 2 discretion in deciding what inferences to draw from the evidence presented at trial, requiring  
 3 only that jurors ‘draw reasonable inferences from basic facts to ultimate facts.’” *Coleman v.*  
 4 *Johnson*, 132 S. Ct. 2060, 2064 (2012) (quoting *Jackson*, 443 U.S. at 319). The jury is entitled  
 5 to believe the State’s evidence and to disbelieve the defense’s evidence. *Wright v. West*, 505  
 6 U.S. 277, 296 (1992).

7 The *Jackson* inquiry focuses not on whether the trier of fact made the *correct* guilt or  
 8 innocence determination but on whether it made a *rational* decision to convict or acquit.  
 9 *Herrera v. Collins*, 506 U.S. 390, 402 (1993) (emphasis in original); *see also Coleman v.*  
 10 *Johnson*, 132 S. Ct. at 2065 (“[T]he only question under *Jackson* is whether [the jury’s] finding  
 11 was so insupportable as to fall below the threshold of bare rationality.”). The *Jackson* standard  
 12 requires the reviewing court to keep in mind the requirements of state law: “the standard must be  
 13 applied with explicit reference to the substantive elements of the criminal offense as defined by  
 14 state law.” *Jackson*, 443 U.S. at 324 n.16.

15 The Washington Court of Appeals considered Mr. Walters’ insufficient evidence claim  
 16 on direct appeal and, after reviewing the testimony and the video evidence, concluded that a  
 17 reasonable jury could have convicted Mr. Walters on the basis of the evidence presented at trial:

18 At trial, the State conceded that Walters was acting in self-defense when  
 19 he started shooting after Washington fired the shotgun. But the jury also  
 20 considered evidence that shortly after Walters began shooting, Washington  
 21 dropped the shotgun and then stumbled or fell to the ground. Walters continued  
 22 shooting as Washington lay on the ground. When Washington got up, he ran  
 away from where Walters was shooting, around one of the gas pump islands, and  
 then across the street. The surveillance video shows Walters chasing Washington  
 and continuing to shoot, as Washington’s shotgun lay on the ground nearby.

23 Evidence that Washington dropped the shotgun, fell to the ground, and  
 then attempted to run away after Walters started shooting supported a reasonable  
 inference that Washington no longer posed an imminent threat to Walters or

1 Chappelle and that Walters was aware of those changed circumstances. Viewed  
2 in the light most favorable to the State, the fact that Walters then chased and  
3 continued shooting at an apparently unarmed Washington was sufficient to permit  
4 the trier of fact to find beyond a reasonable doubt that Walters' use of force was  
5 more than necessary under the circumstances or that there was a reasonable  
6 alternative to the use of force. The evidence was therefore sufficient to satisfy the  
7 State's burden of disproving Walters' claim of self-defense.

8 Walters contends that Washington could have had another weapon and  
9 that the evidence did not establish that he knew Washington was wounded. He  
10 argues that his actions in continuing to shoot were therefore reasonable given the  
11 stressful nature of the incident and its short duration. But these arguments are  
12 properly directed to the trier of fact. The jury was entitled to assess the credibility  
13 of the witnesses, view the videos, and draw contrary inferences. "Credibility  
14 determinations are for the trier of fact and cannot be reviewed on appeal."

15 Walters also contends the evidence was insufficient to establish that he  
16 assaulted Washington with the intent to cause great bodily harm. He points to  
17 evidence suggesting that he was firing "slightly" over Washington's head, that he  
18 did not hit Washington after Washington fell, and that he did not express any  
19 personal animosity towards Washington.

20 A person is guilty of assault in the first degree if, with intent to inflict  
21 great bodily harm, he or she assaults another with a firearm. Specific intent can  
22 be inferred as a logical probability from all the facts and circumstances.

23 Although the surveillance video cannot establish with absolute certainty  
precisely where Walters was aiming, Harris testified that after Washington  
dropped the shotgun and fell to the ground, Walters fired multiple shots by his  
head. Walters then chased after Washington and continued to fire in the general  
direction of Washington's back. Viewed in the light most favorable to the State,  
the evidence was sufficient to establish that Walters assaulted Washington with  
the intent to commit great bodily harm.

Dkt. 12, Exhibit 15, at 5-7 (footnotes and citations omitted).

To convict Mr. Walters of the crime of first-degree assault, the State was required to  
prove that Mr. Walters assaulted Washington "with a firearm or any deadly weapon or by any  
force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). This is a  
specific intent crime requiring proof of "intent to produce a specific result, as opposed to intent  
to do the physical act that produces the result." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439

1 (2009). Specific intent may be inferred from all the facts and circumstances, including the  
2 manner in which the assault was committed and the nature of the prior relationship between the  
3 alleged assailant and the victim. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).  
4 Self-defense, where applicable, is a complete defense that negates the mental state of intent and  
5 shifts the burden to the State of disproving self-defense beyond a reasonable doubt. *State v.*  
6 *Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Self-defense is a lawful act “[w]henever  
7 used by a party about to be injured, or by another lawfully aiding him or her, in preventing or  
8 attempting to prevent an offense against his or her person, or a malicious trespass, or other  
9 malicious interference with real or personal property lawfully in his or her possession, in case the  
10 force is not more than is necessary.” RCW 9A.16.020(3).

11 Evidence of self-defense is assessed by the trier of fact “from the standpoint of the  
12 reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.”  
13 *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). A person may use the same amount of  
14 force to defend another person as he may use to defend himself, so long as the person being  
15 defended is present at the time of the incident. *State v. Jarvis*, 160 Wn. App. 111, 121, 246 P.3d  
16 1280 (2011); *State v. Trevino*, 10 Wn. App. 89, 99, 516 P.2d 779 (1974).

17 Considered in the light most favorable to the State, the evidence was sufficient to support  
18 the jury’s conclusion that Mr. Walters used unlawful force and intended to inflict great bodily  
19 harm on Deche Washington. The jury heard the testimony of Detra Harris, an eyewitness to the  
20 episode, and also viewed the security camera video recordings from the scene at the Unocal 76  
21 gas station. Dkt. 12, Exhibit 4, at 128-40; *see also* Exhibit 28, App. L (State’s trial exhibit 105)  
22 at first camera (“7-Pumps”), 10:21. Ms. Harris testified that as Washington and Chappelle  
23 “squared up” to fight, she saw Mr. Walters flash a handgun. *Id.*, Exhibit 4, at 132. Washington



1 retrieved a 12-gauge shotgun from Harris's car and walked toward Chappelle, firing a "warning  
2 shot" into the air. *Id.* Chappelle ran away with his hands in the air, but Mr. Walters remained  
3 and walked around the gas pumps in the direction of Washington. *Id.*, Exhibit 28, App. L, at  
4 10:21:09-18. After Mr. Walters shot him, Washington turned around and doubled over,  
5 clutching his side. *Id.*, Exhibit 4, at 138; Exhibit 28, App. L, at 10:21:22-25. Washington then  
6 fell to the ground, dropping the shotgun in the process, and did not pick up the shotgun again.  
7 *Id.*, Exhibit 4, at 138; Exhibit 28, App. L, at 10:21:22-25.

8 Mr. Walters fired several shots at Washington as Washington lay unarmed on the ground  
9 trying to cover his head. *Id.* Mr. Walters continued shooting at Washington as Washington  
10 scrambled to his feet and fled from the gas station into the street, running in a "zigzag" pattern  
11 "trying to dodge the bullets." *Id.* at 138-39; Exhibit 28, App. L, at 10:21:28-33. Mr. Walters  
12 continued to shoot at Washington as he chased him out of the gas station lot. *Id.*, Exhibit 4, at  
13 138; Exhibit 28, App. L, at 10:21:27-33. (The detectives later collected one 12-gauge shotgun  
14 shell casing from the crime scene and a total of 15 .40 cal. casings likely from Mr. Walters'  
15 firearm. *Id.*, Exhibit 4, at 78-79, 89; Exhibit 5, at 67-68). Harris ran to her car and picked up  
16 Washington in a vacant lot across the street; he was weak, barely conscious, and barely  
17 breathing. *Id.*, Exhibit 4, at 132, 141-42. She sped off to Harborview hospital at high speeds,  
18 with Walters trailing them briefly before he turned off. *Id.* at 142-44. Washington had lost a  
19 tremendous volume of blood. *Id.* at 143. Paramedics at Harborview initially pronounced  
20 Washington dead on arrival, but Washington was taken to the operating room. He received  
21 blood transfusions, the bullet wound to his femoral artery and femoral vein was repaired, and he  
22 survived. *Id.*, Exhibit 5, at 87-88.

23 As noted by the state appellate court, the State conceded that Mr. Walters may have

1 initially acted in self-defense or in defense of Chappelle, but argued that the assault started at the  
2 point when Mr. Walters continued to pursue and fire at Washington after Washington was hit  
3 and had dropped the shotgun. *Id.*, Exhibit 4, at 11-12, 15 (opening statement); Exhibit 5, at 119,  
4 122-23 (closing). Throughout trial the defense contended that Mr. Walters had used lawful and  
5 reasonable force at all times to defend Chappelle. *Id.*, Exhibit 4, at 18-19. Defense counsel's  
6 closing argument attempted to recreate the fear and confusion at the time of Washington's  
7 shotgun blast, dramatically exclaiming "Boom! Rack!" and asking the jury, "What would you  
8 do? What's reasonable under the circumstances?" *Id.*, Exhibit 5, at 144. He asserted "[t]here is  
9 only one answer, and that's to try to defend yourself from those blasts, to try to defend your  
10 friend from those blasts." *Id.* at 145. The jury rejected the defense's arguments and convicted  
11 Mr. Walters as charged.

12 Mr. Walters fails to show the state court decision of this claim was contrary to or an  
13 unreasonable application of clearly established federal law and therefore, federal habeas relief as  
14 to Claim 1 should be denied.

15 **B. Claim 2 – Affirmative Defense of Necessity**

16 In his second ground for relief, Mr. Walters argues that the trial court, by refusing to give  
17 a jury instruction on the defense of necessity, effectively denied him the right to present a  
18 defense to the unlawful possession of a firearm count.

19 At trial, Mr. Walters' defense counsel requested a necessity instruction. *Id.*, Exhibit 5, at  
20 110-11. The State opposed the request, arguing that the evidence showed Mr. Walters possessed  
21 the firearm before any necessity arose. *Id.* at 111-12. Based on the evidence presented at trial,  
22 the trial court denied the defense request:

23 I think – I am not going to give the instruction. I think these facts are  
really quite similar to Jeffrey ....

1           At this point I will take the burden and the facts most favorable to the  
2 defense in looking at the evidence, because that would seem to me to be the  
3 appropriate way to look at it, but we have seen this videotape from three different  
4 angles.

5           We don't see Mr. Walters going back to a car to get a gun. He's out there,  
6 and he shoots. From the videotape, there just is no evidence that he was not in  
7 possession of the gun before the incident – before the shooting arose from Mr.  
8 Washington. So I am declining to give the instruction.

9 Dkt. 12, Exhibit 5, at 112-13.

10           On direct appeal, the Washington Court of Appeals concluded that Mr. Walters was not  
11 entitled to rely on the necessity defense because the evidence and testimony showed he was  
12 already in possession of the gun before the shooting incident began:

13           Harris testified that Walters displayed a handgun while Washington and  
14 Chappelle were still facing off, before Washington retrieved the shotgun from  
15 Harris's car. A short time later, Walters began shooting and chasing Washington  
16 after he discharged the shotgun. Although Walters' car remains visible  
17 throughout the incident on one of the surveillance videos, there is no indication  
18 that Walters retrieved the gun from the car or from anyone else in response to  
19 Washington's actions.

20           Even when viewed in the light most favorable to Walters, the evidence  
21 established only that he possessed the pistol before any possible threat arose. The  
22 trial court properly refused to instruct the jury on the proposed necessity defense.

23 Dkt. 12, Exhibit 15, at 9 (footnotes omitted).

          “As a general proposition a defendant is entitled to an instruction as to any recognized  
defense for which there exists evidence sufficient for a reasonable jury to find in his favor.”  
*Mathews v. United States*, 485 U.S. 58, 63 (1988). Failure to instruct the jury on the defendant's  
theory of the case may be reversible error if the defense theory is legally sound and evidence in  
the case makes it legally applicable. *Clark v. Brown*, 450 F.3d 898, 904-05 (9th Cir. 2006)  
(citing cases). But “not every ambiguity, inconsistency, or deficiency in a jury instruction rises  
to the level of a due process violation. The question is ‘whether the ailing instruction ... so

1 infected the entire trial that the resulting conviction violates due process.” *Middleton v. McNeil*,  
 2 541 U.S. 433, 437 (2004) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). In habeas cases,  
 3 the burden on the petitioner is “especially heavy” where the alleged error involves the failure to  
 4 give an instruction, as compared to an erroneous instruction, because “[a]n omission, or an  
 5 incomplete instruction, is less likely to be prejudicial than a misstatement of the law.”  
 6 *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). Habeas relief may not be granted unless the  
 7 instructional error had “substantial and injurious effect or influence in determining the jury’s  
 8 verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

9 Washington law recognizes the affirmative defense of necessity in appropriate cases  
 10 where circumstances forced the defendant to take unlawful action in order to avoid a greater  
 11 injury. *State v. Diana*, 24 Wn. App. 908, 913, 604 P.2d 1312 (1979). The defense is applicable  
 12 to the crime of unlawful possession of a firearm where the defendant demonstrates:

13 (1) he was under unlawful and present threat of death or serious injury, (2) he did  
 14 not recklessly place himself in a situation where he would be forced to engage in  
 15 criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct  
 causal relationship between the criminal action and the avoidance of the  
 threatened harm.

16 *State v. Jeffrey*, 77 Wn. App. 222, 225, 889 P.2d 956 (1995). The necessity defense is not  
 17 available, however, if the defendant was armed with a firearm prior to facing an immediate  
 18 threat. *See State v. Parker*, 127 Wn. App. 352, 355-56, 110 P.3d 1152 (2005) (trial court  
 19 properly refused necessity instruction where defendant routinely carried a firearm for protection  
 20 and did not face any immediate or specific threat); *State v. Jeffrey*, 77 Wn. App. at 227 (trial  
 21 court properly denied necessity instruction where defendant armed himself without evidence that  
 22 alleged intruder could have immediately entered defendant’s home or caused serious bodily  
 23 injury or death); *see also State v. Stockton*, 91 Wn. App. 35, 43-44, 955 P.2d 805 (1998) (trial

1 court properly gave necessity instruction where the evidence showed defendant grabbed the gun  
2 from the person who was assaulting him).

3 Mr. Walters fails to show the state court decision of this claim was contrary to or an  
4 unreasonable application of clearly established federal law and therefore, federal habeas relief as  
5 to Claim 2 should be denied.

6 **C. Claim 3 – Denial of Request to Substitute Counsel**

7 In his third ground for relief Mr. Walters argues that the trial court denied him his right to  
8 counsel of choice by denying his motion to substitute counsel.

9 On the scheduled first day of trial in his case, December 10, 2008, Mr. Walters’ attorney  
10 Brian Todd moved to withdraw from the case based on a conflict of interest and proposed that  
11 attorney Santiago Juarez be allowed to substitute for him. Dkt. 12, Exhibit 1, at 4. Juarez  
12 appeared telephonically from his home in New Mexico, joined in Todd’s request, and stated he  
13 could be ready for trial in Mr. Walters’ case in mid-February or early March of 2009. *Id.* at 4-5.  
14 The prosecutor objected to the lengthy continuance, mainly because it was being requested on  
15 what was supposed to be the first day of trial. *Id.* at 7. Before resolving the issue, the trial court  
16 (Judge Palmer Robinson) wanted to explore the nature of the alleged conflict Todd had alluded  
17 to at the outset. *Id.* at 7-8. Todd was unable to reveal the basis for the conflict in open court, so  
18 the court took a brief recess to meet with Todd in chambers and discuss the issue. *Id.* at 8. The  
19 basis for the alleged conflict does not appear in the transcript, but Mr. Walters later summarized  
20 the situation in a declaration he submitted along with his personal restraint petition. According  
21 to Mr. Walters, he became disenchanted with Todd’s representation of him “[w]hen I realized  
22 that [the case] was not going to go away.” *Id.*, Exhibit 24, attached Declaration of Johnnie  
23 Walters Jr., at 1. He contacted Juarez because it appeared the case was indeed headed for trial.

1 *Id.* He told Todd he was “not happy” with his representation, he “could not pay for him  
2 anymore,” and that he had asked Juarez to take over. *Id.* at 2.

3 After the recess, the trial court stated its conclusion that there was neither a conflict of  
4 interest nor a basis for withdrawal:

5 THE COURT: I don’t find there to be a conflict such as would warrant me either  
6 – well, continuing the trial date or allowing Mr. Todd to withdraw.

7 MR. TODD: I guess, your Honor, would it be a choice of counsel issue? That Mr.  
8 Walters has a right to choose which counsel?

9 THE COURT: Not on the trial date he doesn’t. ... You can’t wait until trial and  
10 then say, well, actually, now that I thought about it, I’d rather have somebody else  
11 represent me and I need a continuance of three months. ... I don’t find that there’s  
12 a conflict such as would warrant appointing new – or not appointing, but  
13 substitution of counsel and continuing the trial date on the trial date. And that’s  
14 really all I’ve been asked to do.

15 ....

16 MR. JUAREZ: I will talk with Mr. Todd after this and if he’s comfortable with it,  
17 and could give me discovery, I’ll associate with him.

18 ....

19 THE COURT: My ruling, Mr. Juarez, is not – it is with respect to – it’s limited to  
20 that Mr. Todd hasn’t presented a conflict. It is not a reflection on who the  
21 proposed substituting counsel is.

22 ....

23 MR JUAREZ: I’ll talk with Mr. Todd after this. ... I know my client wants me  
there. And if Mr. Todd is comfortable with allowing me to sort of second chair  
this with him then we’ll do it that way.

THE COURT: Okay.

Dkt. 12, Exhibit 1, at 8-11; *see also* Exhibit 6 (written order signed by Judge Robinson).

One week later, on December 17, 2008, Judge Susan Craighead signed an order  
appointing Todd to serve as Mr. Walters’ counsel “at public expense.” *Id.*, Exhibit 7. Mr.  
Walters’ trial was continued multiple times at the request of the State and/or defense counsel.  
*See id.*, Exhibit 28, App. I (continuance orders). The case ultimately went to trial on August 17,

2009, some eight months later. *Id.*, Exhibit 4. Between December 10, 2008 and the start of trial, neither Mr. Walters nor Juarez raised the issue of substitution again and Juarez did not appear on Mr. Walters' behalf or otherwise attempt to join the defense team.

The Washington Court of Appeals rejected Mr. Walters' claim that he had been denied counsel of his choice:

Walters now characterizes the trial court's ruling as a denial of Juarez's motion to appear and represent him, claims the ruling lacked a clearly articulated reason, and complains that the case did not go to trial until August, almost eight months after Juarez asked for only 30 to 60 days to prepare for trial. Walters fails to demonstrate grounds for relief. The trial court sufficiently limited and explained its ruling. Nothing in the record suggests that the trial court prevented Juarez from associating with Todd or participating in the case as he stated on the record that he intended to do. And nothing in the record indicates that the December 10 ruling somehow prevented Walters from requesting new counsel or Juarez from appearing in the case any time over the next several months as the case was continued for other reasons.

Dkt. 12, Exhibit 30, at 4-5. The Washington Supreme Court agreed and denied Mr. Walters' motion for discretionary review:

The ... facts balance in favor of disallowing the substitution and continuance at that time. The request was made on the first day of trial. Mr. Walters has still not shown the existence of an actual conflict of interest justifying substitution. His general unhappiness with Mr. Todd's lack of success in getting the case dismissed was insufficient to justify substitution. ... and Mr. Juarez needed a significant amount of time to prepare if he was to take over from Mr. Todd.

Dkt. 12, Exhibit 32, at 2-3 (citation omitted).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. An element of this right is the defendant's "right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (*quoting*

1 *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989)); *see also Powell v.*  
2 *Alabama*, 287 U.S. 45, 53 (1932) (“It is hardly necessary to say that the right to counsel being  
3 conceded, a defendant should be afforded a fair opportunity to secure counsel of his own  
4 choice.”). The erroneous denial of the right to counsel of choice qualifies as structural error; that  
5 is, the defendant who establishes that his right to counsel of choice was violated need not  
6 demonstrate prejudice in order to be entitled to relief, as would a defendant who is claiming that  
7 counsel provided ineffective assistance. *Gonzalez-Lopez*, 548 U.S. at 150. “[T]he right at stake  
8 here is the right to counsel of choice, not the right to a fair trial; and that right was violated  
9 because the deprivation of counsel was erroneous. No additional showing of prejudice is  
10 required to make the violation ‘complete.’” *Id.* at 146.

11       However, the right to counsel of choice is “circumscribed in several important respects.”  
12 *Wheat v. United States*, 486 U.S. 153, 159 (1988). A defendant does not have the right to be  
13 represented by (1) an attorney he cannot afford, (2) an attorney who is not willing to represent  
14 him, (3) an attorney who has a conflict of interest, or (4) a person (other than himself) who is not  
15 a member of the bar. *Id.* A trial court has “wide latitude in balancing the right to counsel of  
16 choice against the needs of fairness, ... and against the demands of its calendar.” *Gonzalez-*  
17 *Lopez*, 548 U.S. at 152 (*citing Wheat*, 486 U.S. at 163-64; *Morris v. Slappy*, 461 U.S. 1, 11-12  
18 (1983)). Thus, trial courts have the discretion to make scheduling and other decisions that may  
19 have the effect of excluding a defendant’s first choice of counsel. *Id.* With regard to the timing  
20 of a defendant’s request to substitute counsel, “only [a trial court’s] unreasoning and arbitrary  
21 ‘insistence upon expeditiousness in the face of a justifiable request for delay’” violates the Sixth  
22 Amendment. *Morris v. Slappy*, 461 U.S. at 11-12 (*quoting Ungar v. Sarafite*, 376 U.S. 575, 589  
23 (1964)).



1 The trial court did not rule that Juarez could not serve as Mr. Walters' defense counsel.  
2 Rather, the court ruled that Mr. Walters' subjective dissatisfaction with Todd's inability to make  
3 his case "go away" was not a sufficient basis for Todd's withdrawal and continuance of the then  
4 scheduled trial date of December 10, 2008. The court did not prohibit Juarez from associating  
5 with Todd or "second-chairing" the case with Todd, or even taking over the case from Todd.  
6 Mr. Walters waited until the first day of trial to request substitute counsel, and the proposed  
7 substituting counsel was not even within the state of Washington at that time and was not  
8 available for trial for at least two or three months.

9 In addition, Mr. Walters never renewed his motion to substitute counsel at a later time,  
10 despite the fact that his trial was continued several times and did not begin for another eight  
11 months. And, although Juarez advised the court that he intended to work alongside Todd, he  
12 never actually appeared on Mr. Walters' behalf at any time.

13 Mr. Walters fails to show the state court decision of this claim was contrary to or an  
14 unreasonable application of clearly established federal law and therefore, federal habeas relief as  
15 to Claim 3 should be denied.

16 **D. Claim 4 – Ineffective Assistance of Counsel**

17 In his fourth ground for relief, Mr. Walters contends that his defense attorney provided  
18 ineffective assistance of counsel at trial because he failed to call Charles Chappelle as a defense  
19 witness. He contends that counsel failed to conduct any pre-trial investigation into whether Mr.  
20 Chappelle could have offered exculpatory evidence as to Mr. Walters' intent that day. Mr.  
21 Walters contends that Mr. Chappelle had a lot to say about the incident as evidenced by Mr.  
22 Chappelle's declaration.

23 Charles Chappelle was with Mr. Walters at the Union 76 station and started the argument

1 with Deche Washington that eventually led to the shooting. According to the declaration he later  
 2 submitted, Mr. Chappelle would have testified that Mr. Walters saved his life by firing back at  
 3 Washington when Washington fired the shotgun. Dkt. 12, Exhibit 24, attached Declaration of  
 4 Chappelle, at 2. Mr. Chappelle claimed Washington appeared “like surprised” when Walters  
 5 began shooting at him, and Washington “hit the ground with the shot gun.” *Id.* at 2. Chappelle  
 6 yelled to Walters that “[t]he MF is going for his shit, shoot the MF.” *Id.* In Chappelle’s  
 7 recounting of the incident, Mr. Walters then shot in Washington’s direction, Washington got into  
 8 his SUV and drove off, and Chappelle and Walters fled in the opposite direction. *Id.* Mr.  
 9 Chappelle states he believed Washington “was heading back towards the shot gun” during the  
 10 shooting, presumably to re-arm himself and fire at Walters or Chappelle. *Id.* at 3.

11 It appeared to me throughout the shooting that Johnnie was shooting high, not like  
 12 intending to shoot Deche but scare him off, but things happened so fast and I was  
 13 in fear for my life. There was no question in my mind that night but that Deche  
 14 intended to kill me.

15 *Id.* at 2.

16 The Washington Court of Appeals on direct appeal summarized the security camera  
 17 video of the incident as follows:

18 [S]hortly after Walters began shooting, Washington dropped the shotgun  
 19 and then stumbled or fell to the ground. Walters continued shooting as  
 20 Washington lay on the ground. When Washington got up, he ran away from  
 21 where Walters was shooting, around one of the gas pump islands, and then across  
 22 the street. The surveillance video shows Walters chasing Washington and  
 23 continuing to shoot, as Washington’s shotgun lay on the ground nearby.

24 Dkt. 12, Exhibit 15, at 5-6. A review of the security camera video confirms that this summary is  
 25 accurate. Dkt. 12, Exhibit 28, App. L (State’s trial exhibit 105) at first camera (“7-Pumps”),  
 26 10:21:25-33.

27 The physical evidence collected at the crime scene – which included one spent 12-gauge

1 shotgun shell fired by Washington, compared to the fifteen .40 caliber casings from Mr. Walters’  
2 pistol – further corroborated the State’s theory that Mr. Walters responded with far more force  
3 than was reasonable under the circumstances. Dkt. 12, Exhibit 15, p. 3.

4 The Sixth Amendment guarantees a criminal defendant the right to effective assistance of  
5 counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Claims of ineffective assistance  
6 of counsel are evaluated under the two-prong test set forth in *Strickland*. Under *Strickland*, a  
7 defendant must prove (1) that counsel’s performance was deficient and, (2) that the deficient  
8 performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

9 With respect to the first prong of the *Strickland* test, a petitioner must show that counsel’s  
10 performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688.  
11 Judicial scrutiny of counsel’s performance must be highly deferential. *Id.* at 689. There is a  
12 strong presumption that counsel’s performance fell within the wide range of reasonably effective  
13 assistance. *Id.* The second prong of the *Strickland* test requires a showing of actual prejudice  
14 related to counsel’s performance. In order to establish prejudice, a petitioner “must show that  
15 there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the  
16 proceeding would have been different. A reasonable probability is a probability sufficient to  
17 undermine confidence in the outcome.” *Id.* at 694.

18 In its adjudication of this claim, the Washington Court of Appeals recited *Strickland*’s  
19 two-part test and concluded that the claim was without merit:

20 To establish prejudice, Walters contends that the jury heard “less than the  
21 full story to decide whether Mr. Walters used excessive force that night and was  
22 guilty of the charged conduct.” He argues that Chappelle’s perception of the  
23 events could have changed the jury’s interpretation of the surveillance video and  
could have reasonably resulted in an acquittal. But, as the State points out, the  
surveillance video and Harris’s testimony indicated that Walters continued to  
chase and shoot at Washington as he ran away from the dropped shotgun and the  
police recovered one shotgun shell and fifteen handgun cartridge casings at the

1 scene. Chappelle's declaration offers no reasonable explanation for Walters'  
2 decision to continue chasing and shooting Washington after he began running  
3 away from the dropped shotgun. Because the State conceded at trial that the  
4 initial shots could have been self-defense and nothing in the record indicates that  
5 Chappelle's expected testimony would have been relevant to the contested issue  
6 at trial of the absence of self-defense once Washington began to run away,  
7 Walters fails to demonstrate prejudice resulting from defense counsel's failure to  
8 interview Chappelle.

9 Exhibit 30, at 5-6.

10 The Commissioner of the Washington Supreme Court similarly concluded that the claim  
11 of ineffective assistance was without merit.

12 Mr. Walters' assault charge was based on his act of shooting of Deche  
13 Washington at the gas station. Mr. Walters claimed he was trying to defend  
14 himself or Charles Chappelle after Mr. Washington fired a shotgun at Mr.  
15 Chappelle. Mr. Walters argues defense counsel was ineffective in failing to  
16 interview Mr. Chappelle and have him testify for the defense. In support, Mr.  
17 Walters relies on the declaration of Mr. Chappelle, who claims that he owes his  
18 life to Mr. Walters.

19 Even if counsel arguably should have obtained Mr. Chappelle's testimony,  
20 there is no reasonable probability that the jury would have acquitted Mr. Walters.  
21 Much of the incident was recorded on the gas station's video surveillance system.  
22 Mr. Washington produced a shotgun and fired it over Mr. Chappelle's head. Mr.  
23 Chappelle fled immediately and did not return. Mr. Walters then produced a  
handgun and started shooting at Mr. Washington, hitting him in the groin area.  
Mr. Washington fell to the ground and dropped the shotgun. Mr. Walters kept  
shooting at Mr. Washington, who rolled around, got up off the ground and started  
running in a zig-zag pattern around the gas pumps before running across Rainier  
Avenue with Mr. Walters in pursuit, still shooting. The police recovered 15  
empty handgun cartridge cases from the scene, indicating the number of shots Mr.  
Walters had fired at Mr. Washington after Mr. Chappelle fled. The prosecutor  
informed the jury that it could convict Mr. Walters on the basis of his act of  
shooting at Mr. Washington after he fell and tried to run away. In light of the  
continuous nature of the shooting after Mr. Chappelle fled, it is unlikely Mr.  
Chappelle's testimony would have led to an acquittal.

24 Dkt. 12, Exhibit 32, at 3-4.

25 The Washington courts applied the proper standard in evaluating Mr. Walters' claim that  
his counsel rendered ineffective assistance by failing to call Mr. Chappelle as a defense witness

1 and reasonably rejected this claim. In addition, Mr. Walters fails to show that if Mr. Chappelle  
 2 had been prepared to make that statement at his trial, that the result of the proceeding would have  
 3 been any different. Mr. Walters fails to show the state court decision of this claim was contrary  
 4 to or an unreasonable application of clearly established federal law and therefore, federal habeas  
 5 relief as to Claim 4 should be denied.

#### 6 **CERTIFICATE OF APPEALABILITY**

7 If the district court adopts the Report and Recommendation, it must determine whether a  
 8 certificate of appealability (“COA”) should issue. Rule 11(a), Rules Governing Section 2254  
 9 Cases in the United States District Courts (“The district court must issue or deny a certificate of  
 10 appealability when it enters a final order adverse to the applicant.”). A COA may be issued only  
 11 where a petitioner has made “a substantial showing of the denial of a constitutional right.” See  
 12 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard “by demonstrating that jurists of  
 13 reason could disagree with the district court’s resolution of his constitutional claims or that  
 14 jurists could conclude the issues presented are adequate to deserve encouragement to proceed  
 15 further.” *Walters-El v. Cockrell*, 537 U.S. 322, 327 (2003).

16 The Court recommends that Mr. Walters not be issued a COA. No jurist of reason  
 17 could disagree with this Court’s evaluation of his habeas claims or would conclude that the  
 18 issues presented deserve encouragement to proceed further. Mr. Walters should address whether  
 19 a COA should issue in his written objections, if any, to this Report and Recommendation.

#### 20 **CONCLUSION**

21 The Court recommends **DENYING** Mr. Walters’ habeas petition on the merits  
 22 without an evidentiary hearing, and **DENYING** the issuance of a certificate of appealability.  
 23 Any objections to this Recommendation must be filed and served upon all parties no later than

1 **Monday, March 23, 2015.** The Clerk should note the matter for **Wednesday, March 25, 2015,**  
2 as ready for the District Judge's consideration if no objection is filed. If objections are filed, any  
3 response is due within 14 days after being served with the objections. A party filing an objection  
4 must note the matter for the Court's consideration 14 days from the date the objection is filed  
5 and served. The matter will then be ready for the Court's consideration on the date the response  
6 is due. Objections and responses shall not exceed twelve (12) pages. The failure to timely  
7 object may affect the right to appeal.

8 DATED this 2nd day of March, 2015.

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11 BRIAN A. TSUCHIDA  
12 United States Magistrate Judge  
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